Nos. 87-1979 and 88-127

In the Supreme Court of the United States

OCTOBER TERM, 1988

CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER

v.

NANCY J. SCHWALB AND WILLIAM MCGLONE

NORFOLK AND WESTERN RAILWAY COMPANY, PETITIONER

v.

ROBERT T. GOODE, JR.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether "employee[s]" engaged in "maritime employment" under Section 2(3) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 902(3), include not only those workers who actually load or unload cargo but also all workers on a covered site who perform work that is an essential element or integral part of the process of loading or unloading.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioners, Chesapeake and Ohio Railway Company (C&O) and Norfolk and Western Railway Company (N&W), operate coal loading terminals in the Hampton Roads area of Virginia. C&O's terminal abuts the James River (87-1979 Pet. 7), while N&W's facility, known as Lambert's Point, adjoins the Elizabeth River (88-127 Pet. 7). Petitioners' freight trains transport coal mined inland for loading onto ships docked at the terminals' piers. Upon arrival, the coal-laden railway cars re-

main in the terminals' "barney" yards until the shiploading process begins. Pet. App. 8A-9A, 46A.[1]

The process of loading coal into ships' holds is highly mechanized and, in all material respects, identical at both petitioners' terminals. When shiploading begins, railway cars move one-by-one from the barney yards and onto "dumpers" at the land end of the piers. A mechanical device called a "retarder" stops each loaded coal car at the correct position on the dumper. Next, other mechanical devices lift and rotate the car, so that its contents drop through a hopper to conveyor belts that feed the coal directly onto the waiting ships. After unloading, the cars roll back to the terminals' holding yards, from which they are eventually sent inland. Barring mechanical failure or other incident, the coal loading process is continuous from the time a car leaves the barney yard until it returns, empty, to the holding yard. Pet. App. 3A-4A, 46A-48A; 87-1979 Pet. 7-9; 88-127 Pet. 8-9.

The respondents in No. 87-1979, Nancy J. Schwalb and William McGlone, were laborers employed by C&O to perform general cleaning at its terminal. Though each had varied duties, they both were frequently required, during the actual shiploading process, to clear away coal that spilled from the conveyor belts and the "trunnion rollers," the devices at the ends of the dumper that enable it to rotate suspended railway cars. Failure to clear away this "trash coal" results in malfunction of the shiploading equipment, thus halting the loading process. Pet. App. 3A-4A, 20A-21A, 23A-24A; 87-1979 Pet. 9. While Schwalb and McGlone easily could have replaced the trash coal on the conveyor belts, applicable union agreements prohibited them from doing so; rather, laborers from a different department performed that task (Pet. App. 4A; 87-1979 Pet. 9-10; 87-1979 Br. in Opp. 5).

The respondent in No. 88-127, Robert J. Goode, Jr., was a machinist for N&W who worked in the Motive Power Depart-

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[1] The contents of the appendices to the petitions in each case are essentially identical, except for their order. Therefore, for ease of reference, we refer only to the Appendix in No. 87-1979, cited as "Pet. App."

ment at Lambert's Point.[2] That department's function was to maintain and operate the coal facility, with machinists in the Department devoting the majority of their time to maintaining and repairing loading equipment and machines. Pet. App. 47A-49A, 52A.

Schwalb sustained a serious head injury on January 11, 1983, when she fell while walking to clear trash coal from the trunnion rollers (87-1979 Pet. 10-11; 87-1979 Br. in Opp. 2). McGlone was injured on February 1, 1983, as he was attempting to clear away trash coal beneath a moving conveyor belt (87-1979 Pet. 10; 87-1979 Br. in Opp. 3). Goode was injured on February 11, 1985, while repairing the retarder located on one of the dumpers at Lambert's Point (88-127 Pet. 9-10; 88-127 Br. in Opp. 2-3). Each respondent brought a timely action under the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 *et seq.*, in the appropriate circuit court of the State of Virginia (Pet. App. 2A, 88-127 Br. in Opp. 2). C&O filed special pleas to the courts' jurisdiction, contending that the respondents' exclusive remedy was under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*[3] N&W moved to dismiss on the same basis. Pet. App. 19A, 23A, 45A.

2. The courts for the Third Judicial Circuit (*McGlone*), Fourth Judicial Circuit (*Goode*), and Seventh Judicial Circuit (*Schwalb*) of Virginia each decided that the LHWCA applied to respondents' claims, sustained petitioners' jurisdictional challenges, and dismissed the FELA actions (Pet. App. 31A-34A, 45A). In each case, the court found no serious dispute that the respondents satisfied the LHWCA's "situs" requirement by working in a statutorily covered geographical area (Pet. App. 20A, 24A-25A, 56A), and thus focused principally on whether

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[2] N&W employs machinists throughout its rail system, assigning them to different sites and different jobs on the basis of seniority (Pet. App. 48A-49A; 88-127 Br. in Opp. 5-6).

[3] The Longshoremen's and Harbor Workers' Compensation Act was retitled by the Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. 98-426, § 27(d)(1), 98 Stat. 1654.

the respondents were "employee[s]" as defined by Section 2(3) of the Act, 33 U.S.C. 902(3) (1982 & Supp. IV 1986).

In resolving this issue of employee status, the circuit courts in the *McGlone* and *Goode* cases explicitly acknowledged a conflict between the restrictive approach to the question that the Virginia Supreme Court followed in *White* v. *Norfolk & W. Ry.*, 217 Va. 823, 232 S.E.2d 807, cert. denied, 434 U.S. 860 (1977), and the more expansive standard adopted by the federal courts of appeals in such decisions as *Price* v. *Norfolk & W. Ry.*, 618 F.2d 1059 (4th Cir. 1980) (Pet. App. 25A-29A, 53A). The courts viewed the Virginia Supreme Court's *White* standard as confining LHWCA coverage to those workers on the situs who were "directly involved" in the loading of cargo (*id.* at 26A, 52A-53A). By contrast, the courts believed, the prevailing standard among the federal courts of appeals is considerably broader, encompassing all workers on the situs whose jobs comprise "an essential element in the loading and unloading of the vessels" (*id.* at 27A-28A, 54A). As the *McGlone* court interpreted it, the federal standard does not require an employee to be involved "in the actual loading of ships," if the maintenance work the employee performed "was essential to the movement of maritime cargo" (*id.* at 27A). The *McGlone* and *Goode* courts resolved this conflict between state and federal court interpretations against adherence to the Virginia Supreme Court's test; in their view, following *White* "would be to interpret a Federal law contrary to all of the decisions of the Federal courts" (*id.* at 28A), and the test formulated by the federal courts was, in fact, the proper test (*id.* at 53A-54A).

Applying the federal courts' status test, the Virginia circuit courts concluded that the LHWCA covered the respondents because they performed tasks essential to the loading of coal at petitioners' terminals. McGlone's cleaning duties were essential because the failure to clear away coal that had fallen from the belts "would eventually interfere with the loading operation and bring it to a halt" (Pet. App. 24A). Similarly, Schwalb's cleaning duties conferred LHWCA coverage because "if the spilled coal was not removed * * * it could have haulted [*sic*] the process of

loading the coal aboard the vessels" (*id.* at 21A). And Goode was an employee under the LHWCA because he maintained and repaired equipment and machines "directly and solely related to the loading and unloading operation" (*id.* at 52A), and was thus "involved in the essential elements of loading and unloading" (*id.* at 51A, citing *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414, 423 (1985)).[4]

3. The Supreme Court of Virginia consolidated Schwalb's and McGlone's appeals and reversed (Pet. App. 1A-18A). Although acknowledging that the United States Court of Appeals for the Fourth Circuit had applied the LHWCA to a painter who did not actually handle cargo but who had maintenance duties essential to the "entire [loading] process" (*id.* at 12A (quoting *Price*, 618 F.2d at 1062 n.4)), and agreeing here that the failure to remove "trash coal" could interrupt that process (Pet. App. 4A), the Virginia court rejected the *Price* court's reasoning and conclusion (*id.* at 12A, 16A-17A), refused to adopt the "overall process" standard and adhered, instead, to the restrictive test set out in *White* (*id.* at 16A-17A). Under that test, the court held, workers must show that their " 'own work and employment' " bears " 'a realistically significant relationship' to 'traditional maritime activity involving navigation and commerce on navigable waters,' " to bring themselves within the LHWCA (*id.* at 10A-11A, quoting *Weyerhaeuser Co.* v. *Gilmore*, 528 F.2d 957, 961 (9th Cir. 1975), cert. denied, 429 U.S. 868 (1976)). Reading this Court's "essential elements of [loading or] unloading" language in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977), to limit LHWCA coverage only to those employees actually "engaged in the handling of cargo" (Pet. App. 14A (quoting 432 U.S. at 267)), the Virginia Supreme Court concluded that "the [*Northeast Marine Terminal*] 'essential elements' standard is more nearly akin to the [*White*] 'significant relationship' standard * * * than the 'overall

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[4] The circuit court in *Goode*, explicitly concluding that the federal standard should prevail over the state's *White* standard to the extent that the standards differed, nevertheless held that the activities of Goode qualified him for coverage under the *White* test as well (Pet. App. 53A).

process' construction" (Pet. App. at 16A). Without considering how essential their duties were to the overall loading process, the court held that since Schwalb and McGlone performed "purely housekeeping and janitorial tasks," they "were not statutory employees as defined in the LHWCA" (*id.* at 17A). Application of the *White* test thus required reversal of the circuit courts' judgments. Subsequently, relying on its opinion in *Schwalb,* the Virginia Supreme Court reversed the judgment in *Goode* as well (Pet. App. 58A-59A).[5]

DISCUSSION

These cases present this Court with an excellent opportunity to examine the scope of landward coverage under the "status" provision of the 1972 amendments to the Longshore and Harbor Workers' Compensation Act. The Court has faced the question twice before, see *P.C. Pfeiffer Co.* v. *Ford,* 444 U.S. 69 (1979); *Northeast Marine Terminal Co.* v. *Caputo,* 432 U.S. 249 (1977), each time finding the employees covered because "they were 'engaged in longshoring operations,' and thus fit one of the categories explicitly enumerated by Congress as part of 'maritime employment.' " *Director, Office of Workers' Compensation Programs* v. *Perini North River Assocs.,* 459 U.S. 297, 318 n.27 (1983). As the Court has recognized (*ibid.*), in neither case did it determine that the concept of "maritime employment" required "an examination into whether the employment had a 'direct' or 'significant relationship to navigation or commerce.' "

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[5] The Court did not consider, as an independent ground on which it could sustain the lower court's holding, the fact that Goode's duties as a pier mechanic at times involved work "over the water" (88-127 Br. in Opp. 6; 88-127 Pet. App. 26A, 33A), and that such work therefore may have qualified Goode as a covered employee under *Northeast Marine Terminal,* 432 U.S. at 273 (post-1972 LHWCA meant to cover "amphibious workers" or those who spent "at least some of their time in indisputably longshoring operations and who, without the 1972 Amendments, would be covered for only part of their activity") and *Director, Office of Workers' Compensation Programs* v. *Perini North River Assocs.,* 459 U.S. 297, 311-312 (1983) (workers injured on navigable waters before 1972 covered under LHWCA without regard to duties performed; post-1972 Act covers all previously covered).

The Supreme Court of Virginia has attempted to create a "significant relationship" test here, one that is severely limited in scope. The Virginia court's decisions in *White* and the instant cases make that limitation clear: the court's test essentially requires workers claiming coverage because of stevedoring or similar activities to demonstrate that they are actually loading or unloading maritime cargo (either by physically handling the cargo or by manipulating machinery used for that purpose) in order to bring themselves within the LHWCA's ambit. This test conflicts with the expansive interpretation of the LHWCA's status provision suggested by its statutory language and legislative history, accorded that provision by this Court, and uniformly applied by the federal courts of appeals, the Department of Labor, and the Benefits Review Board (BRB). The conflict creates uncertainty over the proper test for employment status that invites forum-shopping among injured workers, implicates the Department of Labor's administration of the LHWCA program, and potentially impinges on the rights and interests of employers and employees alike.[6] These results frustrate Congress's intent that "a simple, uniform standard of coverage" apply under the LHWCA. Pfeiffer, 444 U.S. at 83. Given the practical importance of the issue and the disagreement among the lower courts addressing it, review by this Court is warranted.

1. The language and legislative history of the 1972 amendments to the LHWCA indicate that a broad reading of the

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[6] In this case, because the FELA provides potentially lucrative, albeit uncertain, relief if the LHWCA does not cover respondents, a finding of no LHWCA coverage may well inure to their immediate financial benefit. The possible advantage presented by a "no LHWCA coverage" finding to these respondents, however, does not illuminate the inquiry into the scope of the LHWCA's status requirement. In numerous other situations, to preclude coverage of claimants who, like respondents, perform tasks integral to the loading and unloading process, would be to consign them to "the paucity of relief under *state* compensation laws." *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715, 723 (1980). That result would be plainly inconsistent with Congress's intent in its 1972 landward extension of the LHWCA, to alleviate the problem of inadequate state remedies (*ibid.*).

coverage provided by the statute is required. These amendments were intended to remedy several problems. First, Congress sought to eliminate circumvention of the LHWCA compensation system through resort to an action for unseaworthiness.[7] See S. Rep. No. 1125, 92d Cong., 2d Sess. 1-2, 5-12 (1972); H.R. Rep. No. 1441, 92d Cong., 2d Sess. 1-8 (1972); *Perini*, 459 U.S. at 313; *Northeast Marine Terminal*, 432 U.S. at 260-261. In addition, Congress sought to expand the Act's scope; it wanted to remedy a coverage anomaly that limited longshore and harbor workers to recovering LHWCA benefits for work-related injuries sustained on navigable waters and left those who sustained similar injuries on the adjoining land without an LHWCA remedy. See S. Rep. No. 1125, *supra*, at 1, 12-13; H.R. Rep. No. 1441, *supra*, at 10-11; *Perini*, 459 U.S. at 306-312; *Northeast Marine Terminal*, 432 U.S. at 256-265; *Pfeiffer*, 444 U.S. at 72-73.

Congress effected the coverage change through two specific amendatory clauses. First, it modified the Act's "situs" requirement, expanding the definition of "navigable waters" under Section 3(a), 33 U.S.C. 903(a), to include " 'any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employee in loading, unloading, repairing, or building a vessel.' " *Northeast Marine Terminal*, 432 U.S. at 263. This case involves the second of the amendatory clauses, the new "status" requirement Congress added to Section 2(3), 33 U.S.C. 902(3), "to describe affirmatively the class of workers [it] desired to compensate." *Northeast Marine Terminal*, 432 U.S. at 264. Under the amended status test, LHWCA coverage extends to injured workers "en-

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[7] Prior to the 1972 amendments, a longshoreman or related worker could bring an unseaworthiness action for injury incurred on board a ship against the owner of that ship, and could do so even if the condition causing the injury had been the fault of the longshoreman or his employer. See, *e.g.*, *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946). The shipowner could then recover the damages paid to the worker from that worker's employer under theories of express or implicit warranty of workmanlike performance. See, *e.g.*, *Ryan Stevedoring Co.* v. *Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956).

gaged in maritime employment," including specifically "any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker * * *." 33 U.S.C. 902(3).

Congress did not define "maritime employment," "longshoreman," or "longshoring operations" in either the Act or its legislative history. See *Northeast Marine Terminal*, 432 U.S. at 265.[8] However, the broad language of the status test itself suggests that the courts should take "an expansive view of [its] extended coverage." *Id.* at 268.

The remedial purpose of the statute reflected in the legislative history further supports an expansive view of the Act's coverage. *Northeast Marine Terminal*, 432 U.S. at 268 (citing *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953)). As chronicled by this Court (see 432 U.S. at 268-273), Congress decided to extend the coverage of the Act shoreward because of two main concerns. First, pre-1972 benefits under the LHWCA extended only to those longshore and harbor workers who were injured over navigable waters; injuries occurring on land were covered by state workers' compensation laws. The result was "a disparity in benefits payable * * * for the same type of injury depending on which side of the water's edge and in which State the accident occurs." S. Rep. No. 1125, *supra*, at 12; H.R. Rep. No. 1441, *supra*, at 10. Moreover, the disparity between federal benefits and generally lower state benefits was to widen after the passage of the federal benefit reforms contained in the 1972 amendments. S. Rep. No. 1125, *supra*, at 12-13; H.R. Rep. No. 1441, *supra*, at 10; *Pfeiffer*, 444 U.S. at 83; *Northeast Marine Terminal*, 432 U.S. at 262. Second, Congress recognized that the realities of modern shipping practices, including containerization and other technological innovations, had moved much of the longshoring work it wished to protect onto the land. S. Rep. No. 1125,

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[8] The Committee reports accompanying the Act posit only a single "typical example" of the new status requirement, which, though useful in identifying the outer bounds of coverage, clearly "does not speak to all situations." *Northeast Marine Terminal*, 432 U.S. at 266, 267.

supra, at 13; H.R. Rep. No. 1441, *supra,* at 10; *Northeast Marine Terminal,* 432 U.S. at 270.[9]

These concerns support a liberal construction of the Act's landward coverage—a construction that focuses on the *occupations* of those the Act seeks to protect instead of on the "fortuitous circumstance" of where they are injured (S. Rep. No. 1125, *supra,* at 13; H.R. Rep. No. 1441, *supra,* at 10; see *Pfeiffer,* 444 U.S. at 78-84; *Northeast Marine Terminal,* 432 U.S. at 272-273), and that makes allowance for changing technology (see *Northeast Marine Terminal,* 432 U.S. at 269-271). As this Court has articulated the functional approach of the status provision, all employees "involved in the essential elements of loading and unloading" meet the status requirement of the Act; employees are excluded if they are " '*not* engaged in the overall process of loading or unloading.' " *Herb's Welding, Inc.* v. *Gray,* 470 U.S. 414, 423 (1985) (quoting *Northeast Marine Terminal,* 432 U.S. at 267 (emphasis added)). Coverage thus extends to any worker "responsible for some portion of" the loading and unloading activity since he or she is "as much an integral part of the process * * * as a person who participates in the entire process." *Pfeiffer,* 444 U.S. at 82-83.

In 1984, Congress amended the status provision "to reaffirm the purposes of the 1972 jurisdictional changes, and in that light * * * [to exclude] certain fairly identifiable employers and employees" who, although at work on a covered situs, lack "a sufficient nexus to maritime navigation and commerce." S. Rep. No. 81, 98th Cong., 1st Sess. 25 (1983).[10] The amended provision excludes only certain narrow categories of employees more tenuously connected to maritime work than those involved

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[9] The enormity of the change in the longshoring industry effected by containerization alone, and the difficulties that change engenders when it is necessary to identify "longshoring tasks" have been documented by this Court. See *NLRB* v. *International Longshoremen's Ass'n,* 447 U.S. 490 (1980) (concerning appropriate focus of work preservation agreement in longshoring industry under National Labor Relations Act).

[10] The 1984 amendments and their history are directly relevant to the instant case involving respondent Goode, who was injured on February 11, 1985 (88-127 Br. in Opp. 7).

here,[11] but excludes them *only* if they are eligible for state workers' compensation programs. 33 U.S.C. 902(3) (Supp. IV 1986).[12] Moreover, Congress in 1984 indicated that it considered coverage of employees under the Act appropriate either "because of the nature of the work which they do, or the nature of the hazards to which they are exposed." H.R. Rep. No. 570, *supra,* at 4. This broad approach clearly includes workers facilitating a loading process, who are subject to the same harbor-side risks as those actually handling cargo.

Thus, both the language of the status provision and the purposes expressed by Congress in 1972 and 1984 support a broad, functional approach to the landward coverage of the LHWCA, rather than the restrictive standard applied by the Supreme Court of Virginia.

2. The state court's standard is also inconsistent with the principles of coverage enunciated by this Court and followed by the lower federal courts.

a. In *Northeast Marine Terminal Co.* v. *Caputo, supra,* this Court first determined the reach of LHWCA coverage under the status provision of the 1972 amendments. The case involved two employees, a "checker" (the worker responsible for checking and recording cargo as it is loaded or unloaded) and a longshoreman who at the time of injury was working as a "terminal laborer" helping to load already-discharged cargo into consignees' trucks. After reviewing the history of the LHWCA with attention to Congress's continued efforts to provide uniform

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[11] The amendments exclude from coverage, *inter alia,* "individuals employed exclusively to perform office clerical, secretarial, security, or data processing work; * * * [or] employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance)." 33 U.S.C. 902(3) (Supp. IV 1986). Even these carefully limited exclusions "are intended to be narrowly construed." H.R. Rep. No. 570, 98th Cong., 1st Sess. 5 (1983).

[12] In the words of the House Report, workers not protected by state programs would "*remain* under the coverage of the Longshore Act," to whatever extent they were already covered by the Act's broad definition of maritime employment. H.R. Rep. No. 570, 98th Cong., 1st Sess. 5 (1983) (emphasis added).

coverage to "amphibious workers" (432 U.S. at 256-265, 273), the Court concluded that the Act's status provision should be interpreted broadly and in functional terms. The Court held that the "checker" satisfied the status requirement because, although his longshoring functions had been somewhat changed by technology (the employee was checking the contents of a container on shore on the day of the accident), his work was "an integral part of the unloading process as altered by the advent of containerization." *Id.* at 271. The Court held that the "terminal laborer" also met the status requirement; since he spent some of his time in "indisputably longshoring operations" (*id.* at 273), the Act's "focus on occupations and its desire for uniformity" supported continuous coverage under the LHWCA (*id.* at 276).

The Court explicitly rejected restrictions that would have artificially curtailed its functional analysis. First, it denied that union membership should determine eligibility as a "longshoreman" under the Act, noting that "[t]he vagaries of union jurisdiction are unrelated to the purposes of the Act." *Northeast Marine Terminal,* 432 U.S. at 268 n.30. Second, the Court rejected a limitation not unlike that adopted by the Virginia court here. The Court held that the "point-of-rest" doctrine—according to which "stevedoring" was limited to loading or unloading operations seaward of the first "point of rest" on a pier or dock from which cargo is moved into vessels or removed for further transport ashore—was incompatible with the Act's objective of extending uniform coverage on an occupational basis. *Id.* at 275, 276.

This Court confirmed its expansive interpretation of the landward extension of coverage in *P.C. Pfeiffer* v. *Ford, supra,* where it found coverage for two workers, neither of whom loaded or unloaded material directly to or from boats.[13] The Court

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[13] Ford was a "warehouseman" injured while fastening military vehicles (which had been unloaded from a vessel days before) to a railroad flatcar. He was prohibited from moving cargo either directly from a vessel to a point of rest in storage or to a railroad car, or directly from a shoreside point of rest onto a vessel, by union rules reserving such work for longshoremen. *Pfeiffer,* 444 U.S. at 71. Bryant was a "cotton header" injured while unloading cotton

rejected any resurrection of the artificial distinctions imposed by union labels or the point-of-rest theory (444 U.S. at 81-82) and also rejected the creation of similar restrictions by employer "assignment policies" (*id.* at 83). Rather, the Court focused on the "nature of the activity" to which a worker could be assigned: it noted that "[l]and-based workers who do not handle containerized cargo also may be engaged in loading, unloading, repairing, or building a vessel" because "[p]ersons moving cargo directly from ship to land transportation are engaged in maritime employment * * * [and one] responsible for some portion of that activity is as much an integral part of the process of loading or unloading a ship as a person who participates in the entire process" *Id.* at 80, 82-83 (citation omitted); see also *Herb's Welding*, 470 U.S. at 423.

Consistently with the rationale of these decisions, the courts of appeals uniformly view the question of whether employees are "engaged in maritime employment" from a functional perspective, focusing on the nexus between a worker's actual duties and the overall process of loading and unloading cargo.[14] This approach takes into account the reality of conventional longshoring operations: that maritime employment today is significantly affected by technology, job specialization, and the "vagaries of union jurisdiction." Thus, although using slightly varying terms, the courts of appeals have extended coverage under the Act to any employee on a covered situs whose actual duties comprise an "essential element" or "integral part" of the overall loading and unloading process, even if those duties do not themselves include physically or mechanically loading or unloading maritime cargo. This test specifically encompasses workers who, like respondents, engage in cleaning, mainte-

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from its land transport by wagon into a pier warehouse. His loading activities were limited by union rules similar to those applied to Ford. *Id.* at 71-72.

[14] The courts take an identical tack in determining whether employees are "harbor-workers" engaged in ship repair, shipbuilding, and shipbreaking. See, *e.g.*, *Newport News Shipbuilding & Drydock Co.* v. *Graham*, 573 F.2d 167 (4th Cir.), cert. denied, 439 U.S. 979 (1978).

nance, and repair of equipment used to load ships.[15]

b. In holding that respondents were not employees under the LHWCA, the Virginia Supreme Court expressly rejected the courts of appeals' functional test and adhered, instead, to its earlier decision in *White* v. *Norfolk & W. Ry., supra*. Pet. App. 17A. *White* limited coverage under the Act to those employees having a " 'realistically significant relationship' to 'traditional maritime activity involving navigation and commerce on navigable waters.' " 217 Va. at 832, 232 S.E.2d at 812 (quoting

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[15] See, *e.g.*, *Harmon* v. *Baltimore & O.R.R.*, 741 F.2d 1398, 1404 (D.C. Cir. 1984) (railroad worker injured while repairing coal loading equipment is covered employee because his "functions were an integral part of the process of unloading and loading vessels and were vital to the movement of maritime cargo"); *Prolerized New England Co.* v. *Miller*, 691 F.2d 45, 47 (1st Cir. 1982) (worker performing maintenance of ship loading equipment plays "integral part" in loading process); *Sea-Land Services, Inc.* v. *Director, Office of Workers' Compensation Programs*, 685 F.2d 1121, 1123 (9th Cir. 1982) (LHWCA applies to mechanic responsible for repairing equipment used to load cargo onto ships and move it within terminal area because "repair and maintenance of equipment necessary to loading and unloading ships is integral to the process and is therefore 'maritime employment' "); *Hullinghorst Indus., Inc.* v. *Carroll*, 650 F.2d 750, 755-756 (5th Cir. 1981) (carpenter building scaffolding for repairs to loading pier engaged in "maritime employment," since "the maintenance and repair of tools, equipment, and facilities used in indisputably maritime activities lies within the scope of 'maritime employment' " under the Act and such work is "an integral part • • • an essential and indispensable step in the [pier] repairs to be effected"), cert. denied, 454 U.S. 1163 (1982); *Garvey Grain Co.* v. *Director, Office of Workers' Compensation Programs*, 639 F.2d 366, 370 (7th Cir. 1981) (millwright responsible for maintenance and repair of shiploading equipment is employee under LHWCA, since these "functions are an integral part of the loading and unloading" process and "are directly connected with and are vital to the movement of maritime cargo"); *Prolerized New England Co.* v. *Benefits Review Bd.*, 637 F.2d 30, 37 (1st Cir. 1980) (coverage extends to employee whose duties include shortening scrap steel for shipment because "[v]iewed in terms of this functional analysis • • • [the claimant's] repair, maintenance and occasional operation of the varied elements of Prolerized's integrated loading system qualify as peculiarly maritime services"), cert. denied, 452 U.S. 938 (1981); *Price* v. *Norfolk & W. Ry.*, 618 F.2d 1059, 1061 (4th Cir. 1980) (railroad worker injured while painting "gallery" used for loading grain into ships falls within LHWCA's ambit because "[t]he gallery, and its maintenance, are essential to the loading and unloading of all vessels").

Weyerhaeuser Co. v. *Gilmore,* 528 F.2d at 961).[16] The *White* decision makes clear that the court views the "realistically significant relationship" test as requiring direct involvement in the physical process of loading and unloading cargo. Thus, although White's duties required him to maintain electrical equipment essential to the coal loading process, the court concluded that he lacked the requisite "realistically significant relationship to the loading of cargo on ships," because he was "not actually handling any cargo, either manually or mechanically," and "was not manipulating * * * any of the controls of the electrical mechanism, which furnished the power for this automated loading process." 217 Va. at 832-833, 232 S.E.2d at 813. Applying *White,* the court concluded here that respondents Schwalb and McGlone were not statutory employees because they also were not actually " 'engaged in the handling of cargo' " (Pet. App. 14A), notwithstanding that failure to clean trash coal from the rollers and belts would halt the loading process (*id.* at 4A) and that only the "vagaries of union jurisdiction"—specifically, union agreements covering various groups of workers at the terminal—prohibited Schwalb and McGlone from placing the coal back on the belts (*id.* at 4A). The court applied its narrow approach again when it ruled that respondent Goode was not an employee under the Act, although Goode's duties consisted largely of maintenance and repair of machinery and equipment used exclusively for coal loading in a terminal where loading apparently is almost entirely automated (see *id.* at 46A-48A).

We believe that the Supreme Court of Virginia erred in reading this Court's opinions to direct so restrictive a standard for landward coverage under the LHWCA. The Virginia court

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[16] The Virginia Supreme Court's continued reliance on *Weyerhaeuser Co.* v. *Gilmore* is misplaced. The Ninth Circuit has made it clear that it reads *Weyerhaeuser's* "realistically significant relationship" language to mean that "repair and maintenance of equipment necessary to loading and unloading ships is integral to the process and is therefore 'maritime employment' covered by the Act." *Sea-Land Services, Inc.,* 685 F.2d at 1123. Thus, the Ninth Circuit applies its *Weyerhaeuser* formulation in harmony with authority in the other federal circuits.

reads the "essential elements" and "overall process" language in *Northeast Marine Terminal* and *Pfeiffer* in far too cramped a manner (Pet. App. 13A-16A), giving no effect to the directive in those cases that the Act's coverage be viewed expansively, and making no accommodation for the impact of modern technology on cargo handling techniques, for the high degree of job specialization, or for the extent of unionization within the longshore industry.[17] In addition, the conflict between the state court's decision and the weight of federal authority in and of itself offends Congress's goal of applying a "simple, uniform standard of coverage" to LHWCA claims.[18]

3. A restrictive interpretation of landward coverage under the LHWCA conflicts with the Department of Labor's inter-

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[17] Thus, for example, but for the union contracts that prohibited them from placing the trash coal that they had cleared away back on the conveyor belts, Schwalb and McGlone indubitably would have done so. They would then have been involved directly in the actual loading process.

[18] Goode also makes an unpersuasive argument that the state court's exclusion of him from LHWCA coverage is not at odds with the overwhelming weight of federal case law because, until the "unloading process had been completed, the coal was still in land transportation and was not in the process of being loaded aboard a ship" (88-127 Br. in Opp. 20-21). The circuit court specifically found that "the process of loading the coal into vessels begins" once the rail cars leave the barney yard (Pet. App. 46A), and Goode has not even suggested that this finding should be set aside. Additionally, although the decision of the Fourth Circuit in *Conti* v. *Norfolk & W. Ry.*, 566 F.2d 890 (1977) (brakemen injured at Lambert's Point were not employees under the LHWCA) supports Goode's argument, we agree with the observation of the Court of Appeals for the District of Columbia Circuit that the Fourth Circuit has "moved away from using the distinction between 'traditional railroading tasks' and 'traditional maritime tasks' as the sole inquiry, or the dispositive issue in LHWCA cases." *Harmon* v. *Baltimore & O.R.R.*, 741 F.2d 1398, 1404 (1984) (citing *Caldwell* v. *Ogden Sea Transport, Inc.*, 618 F.2d 1037, 1050 (4th Cir. 1980) (*Conti* cited only for "integral part" language); *Price, supra* (drawing no *Conti*-like distinction between "traditional railroading" as opposed to "traditional maritime" tasks), and *Vogelsang* v. *Western Maryland Ry.*, 670 F.2d 1347, 1348 (4th Cir. 1982) (distinguishing *Conti*)). This and other courts have, of course, found railroad workers covered by the LHWCA despite the parallel coverage of the FELA, see, *e.g.*, *Pennsylvania R.R.* v. *O'Rourke*, 344 U.S. 334 (1953); *Harmon, supra*; *Vogelsang, supra*; *Price, supra*, and in such circumstances LHWCA coverage is exclusive under 33 U.S.C. 905.

pretation of the Section 2(3) status requirement, which it has consistently applied since 1972 in administering the LHWCA workers' compensation program. See *Northeast Marine Terminal*, 432 U.S. at 272 (Director's view that " 'maritime employment * * * include[s] all physical tasks performed on the waterfront, and particularly those tasks necessary to transfer cargo between land and water transportation' "). Review is warranted because, at the very least, the Department's interpretation is "based on a permissible construction of the statute"; hence it is entitled to deference and should be given effect. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984); see, *e.g.*, *Morrison-Knudsen Constr. Co.* v. *Director, Office of Workers' Compensation Programs*, 461 U.S. 624, 635 (1983) (consistent practice of those charged with enforcement and interpretation of LHWCA entitled to deference); *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978) (great deference due interpretation of officers or agency administering statute); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969) (construction of statute by those charged with executing it should be followed "unless there are compelling indications that it is wrong").

Further, a restrictive interpretation is also inconsistent with the view of the Benefits Review Board. See, *e.g.*, *Wuellet* v. *Scappoose Sand & Gravel Co.*, 18 Ben. Rev. Bd. Serv. (MB) 108, 110-111 (1986) (welder/mechanic injured while repairing conveyor belt at barge-loading facility is covered under LHWCA since "the repair of equipment at employer's barge facility is an integral part of the loading process * * * and therefore is a maritime activity"); *Verderane* v. *Jacksonville Shipyards, Inc.*, 20 Ben. Rev. Bd. Serv. (MB) 62, 64 (1984) (manager of shipyard's Medical, Safety and Security Department, whose duties required inspecting certain shipbuilding equipment and assuring compliance with safety regulations, was covered employee since he "performed an integral role in assuring" shipyard workers' safety and his duties "were important to the overall progress of maritime construction").

4. The Virginia Supreme Court's interpretation of the LHWCA's status requirement creates a wide rift between the state court, on the one hand, and the federal courts, the Department of Labor, and the BRB, on the other. While normally a single aberrational decision would not warrant this Court's review, we agree with petitioners that the potential impact of the conflict here is substantial, especially in view of the vagaries of Virginia's venue statute (see 87-1979 Pet. 38-39; 88-127 Pet. 42-43). The decision invites forum-shopping among injured workers, including many who reside out-of-state. Workers with potentially strong FELA claims will opt for state court actions, while those confronted with the choice between inadequate or uncertain state remedies and LHWCA benefits will sue in federal court. This result plainly frustrates Congress's intent that a single uniform standard of coverage apply to LHWCA claims. Accordingly, review by this Court is warranted to resolve this conflict.

CONCLUSION

The petitions for writs of certiorari should be granted and the cases consolidated for oral argument.

Respectfully submitted.

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